

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

FSW

Mailed: March 18, 2004

Opposition No. **91156510**

Superscope Technologies, Inc.

v.

Tom Bunch

Before Quinn, Chapman and Holtzman, Administrative Trademark Judges.

By the Board:

This case now comes up for consideration of opposer's motion (filed December 4, 2003) for summary judgment on the pleaded ground of likelihood of confusion; and opposer's motion (filed January 20, 2004) to strike certain evidence filed by applicant in opposition to opposer's motion for summary judgment.

Opposer's Motion to Strike

Opposer has asked the Board to strike portions of the declaration and accompanying exhibits of Bruce Perkins, counsel for applicant, on the ground that applicant's showing is irrelevant. Opposer contends the evidence tends to show only how the parties (and an unrelated third-party) use their respective marks and is not limited to showing how applicant's mark has been applied for or how opposer's marks

are set forth in the pleaded registrations. The Board finds that the evidence submitted under the Perkins declaration is relevant to the issue of likelihood of confusion inasmuch as the evidence addresses several of the *du Pont*¹ factors considered by the Board in determining whether a likelihood of confusion exists between marks. Accordingly, opposer's motion to strike is hereby denied.

Opposer's Motion for Summary Judgment

The Board presumes that the parties and their attorneys are familiar with the facts of the case and the arguments and evidence submitted relating to the summary judgment motion and we will not reiterate that information in our order.

After reviewing the arguments and supporting papers of the parties, we find that applicant has raised genuine issues of material fact as to opposer's claim of likelihood of confusion. At a minimum, genuine issues of material fact exist as to the relationship between the goods identified in the involved application and the pleaded registrations and the channels of trade through which these goods pass.²

¹ In determining whether there is a likelihood of confusion between marks, there are thirteen evidentiary factors, which the Board considers when evidence with respect thereto is made of record. See, *E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

² The fact that we have identified only a few genuine issues of material fact as sufficient bases for denying the motion for summary judgment should not be construed as a finding that these are necessarily the only issues which remain for trial.

In view thereof, opposer's motion for summary judgment is denied.³

Proceedings herein are now resumed, and trial dates, including the closing date for discovery, are reset as indicated below.

DISCOVERY PERIOD TO CLOSE: **July 1, 2004**

30-day testimony period for party in the position of plaintiff to close: **September 29, 2004**

30-day testimony period for party in the position of the defendant to close: **November 28, 2004**

15-day rebuttal period for party in the position of the plaintiff to close: **January 12, 2005**

IN EACH INSTANCE, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party **WITHIN THIRTY DAYS** after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

³ The parties should note that the evidence submitted in connection with the motion for summary judgment is of record only for consideration of the motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. See *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993).

New Developments at the Trademark Trial and Appeal Board

- Files of TTAB proceedings can now be examined using TTAB Vue, accessible at <http://ttabvue.uspto.gov>. After entering the 8-digit proceeding number, click on any entry in the prosecution history to view that paper in PDF format. Papers filed prior to January 2003 may not have been scanned. Unscanned papers remain available for public access at the TTAB. For further information on file access, call the TTAB at (703) 308-9330.
- Parties should also be aware of recent changes in the rules affecting trademark matters, including the rules of practice before the TTAB. See Rules of Practice for Trademark-Related Filings Under the Madrid Protocol Implementation Act, 68 Fed. R. 55,748 (September 26, 2003) (effective November 2, 2003) (www.uspto.gov/web/offices/com/sol/notices/68fr55748.pdf); Reorganization of Correspondence and Other Provisions, 68 Fed. Reg. 48,286 (August 13, 2003) (effective September 12, 2003) (www.uspto.gov/web/offices/com/sol/notices/68fr48286.pdf).
- The second edition (June 2003) of the Trademark Trial and Appeal Board Manual of Procedure (TBMP) has been posted on the USPTO web site at www.uspto.gov/web/offices/dcom/ttab/tbmp/.